Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

GREGORY DENNIS,

Petitioner,

vs.

SCOTT PAPER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is it a denial of procedural due process under the Fifth Amendment to the United States Constitution for a District Court to deny a continuance to a *pro se* litigant to obtain counsel in order to pursue a statutory right?

II. Does a District Court abuse its discretion by denying a *pro se* litigant's motion for continuance in order to obtain counsel where prior counsel failed to adequately prepare Petitioner's case for trial, and the District Court was aware of Petitioner's desire and need for legal representation?

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Petitioner, Gregory Dennis, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the adverse ruling of the United States District Court for the Southern District of Alabama.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit has not been officially reported. (App. A) The judgment and order of the United States District Court for the Southern District of Alabama has not been officially reported. (App. B). The District Court's order regarding Petitioner's motion for a continuance also has not been reported. (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on May 29, 1997. The Court of Appeals denied a timely petition for rehearing on August 28, 1997 (App. D).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are relevant:

Constitutional Provisions

U.S. CONST. amend. V.

The Fifth Amendment to the United States

Constitution provides in relevant part: "No person shall . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. . . . " U.S. CONST. amend. v.

U.S. CONST. amend. VI.

The Sixth Amendment to the United States Constitution provides in relevant part: "In all *criminal prosecutions, the accused shall enjoy the right to* ... to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. CONST. amend. vi.

Statutory Provision

42 U.S.C. § 2000e *et seq.*

(a) it shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge and individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . . 42 U.S.C. § 2000e § 703 (a)(1).

STATEMENT OF THE CASE

A. Procedural History

In July, 1995, Petitioner filed a complaint of racial discrimination in employment with the United States District

Court for the Southern District of Alabama alleging discrimination with respect to pay, promotions, conditions of employment and harassment, in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000 *et seq.*

Prior to trial, Petitioner asked his prior attorneys to withdraw from the case, and filed a motion for continuance so as to obtain replacement counsel. Petitioner later filed a supplemental motion for a continuance and the District Court denied both motions.

At the conclusion of the trial, the District Court granted Respondent's motion for judgment as a matter of law with respect to Petitioner's claim of racial discrimination regarding pay, promotions, conditions of employment, and harassment, finding that Petitioner had failed to establish a prima facie case. The jury returned a verdict for Respondent on Petitioner's retaliatory discharge claim.

On Petitioner's timely appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the District Court, and held that the District Court did not abuse its discretion in denying Petitioner's motion for a continuance.

B. Material Facts

Petitioner, an African-American male, was employed by the Respondent from 1979 until the time of his alleged voluntary resignation on April 11, 1995. At the time of his alleged resignation, Petitioner was a production team leader at Respondent's paper manufacturing plant in the Distribution Center in Mobile, Alabama.

Throughout most of the time Petitioner was employed with Respondent, he made numerous complaints about his pay to the

Respondent regarding the fact that his pay was not in accordance with the standard pay guidelines set out by the Respondent, as compared to his white counterparts, even though he had more job duties and responsibilities, and had received excellent reviews from management.

On or about August, 1994, following a reorganization by Mr. Wente who was the manager for Respondent's mill, Petitioner's job duties were increased but not his paycheck, to correspond with pay guidelines set out by Respondent.

Therefore, Petitioner filed a complaint with Mr. Sharp, the Human Resource manager and Mr. Phil Monroe, who was the Vice President in charge of the Mobile mill.

On or about January, 1995, after the wage freeze imposed by the Respondent was lifted, Petitioner received a pay raise of $3,000 thereby increasing his salary to $45,700. Petitioner was dissatisfied and felt that the pay raise did not bring him up to the level he should be, given his job duties, reviews and the guidelines set out by the Respondent.

Sometime on or about March of 1995, Petitioner again complained to the Respondent about the treatment he was receiving from the Respondent concerning overall, issues of pay discrimination, denial of promotions, and harassment by his immediate supervisor. When the harassment by Petitioner's supervisor increased, Petitioner decided to inform Mr. Wente, the logistics manager of the mill on April 11, 1995, that he had decided to take a legal course of action around his complaint of discrimination and harassment, but was concerned about his job.

When Petitioner arrived home on the evening of April 11, 1995, he discovered that his grandmother, who lived with him, was ill. Since, he was her primary caretaker, Petitioner asked

Mr. Wente, on April 12, 1995, if he could take a Comp day, to which Mr. Wente replied yes. On the same day, Petitioner called his supervisor Mr. Etheridge to see if everything was going okay.

On the week of April 13, 1995, Petitioner asked his supervisor Mr. Etheridge, if it was okay for him to take his scheduled vacation to which Mr. Etheridge replied yes. Throughout the period of his vacation, Petitioner constantly kept in touch with his supervisor and co-workers to check up on things, and to monitor the progress of projects already embarked on.

While on vacation, Petitioner received a letter dated April 20, 1995 from Mr. Wente informing him that pursuant to their telephone conversation of April 11th, he had accepted his resignation. Petitioner was advised to meet with the employment benefits department to sign appropriate paperwork for processing.

Petitioner met with Mr. Wente and Mr. Sharp, the Personnel Manager, the following Monday, and informed Mr. Sharp that he did not resign from his job. Mr. Sharp then proceeded to conduct an investigation concerning the telephone conversation of April 11, 1995 between Petitioner and Mr. Wente. On April 26, 1995, Petitioner received a letter from Mr. Sharp informing him that his investigation revealed that Petitioner's view of the facts and Mr. Wente's concerning the telephone conversation of April 11, 1995, were on opposite ends of the spectrum, and that their decision basically came down to the question of credibility. The latter part of the letter from Mr. Sharp then informed Petitioner that "it will not be necessary for you to return to the plant during this time unless you have personnel effects you want to pick up."

On July 15, 1995, Petitioner proceeded to file a complaint

through attorneys Richard A. Meelheim and Christa H. Meelheim, of the law firm of Meelheim & Alexander in Birmingham, Alabama. The District Court scheduled trial for May, 1996. The Meelheims represented Petitioner though discovery and an April, 1996, settlement conference.

On April 12, 1996, the court sua sponte, continued the trial date until June 4, 1996. On April 24, 1996, the Meelheims filed a motion to withdraw because Petitioner had "informed them that he no longer wishes for them to represent him in this matter, and that he intends to seek other representation." On *April 29, 1996*, the District Court granted the Meelheims motion "In view of counsel's contention that it is the Petitioner himself who desires to seek other representation." The District Court also ordered the Petitioner to advise the court in writing on or before May 16, 1996, of the identity of his newly retained counsel or his intent to proceed pro se. The District Court concluded by informing Petitioner that the fact that Petitioner desires and or does retain substitute counsel will not constitute grounds to continue the jury selection and trial of the case as set during the June Civil trial term of court.

On *April 30, 1996*, Petitioner filed a motion for continuance stating as grounds for the motion the following:

(1) That Plaintiff had terminated his agreement with the Meelheims and the Meelheims subsequent withdrawal from the case.

(2) that an extension of time would be needed in order to obtain new counsel, and to enable new counsel to prepare for trial.

(3) That Petitioner's previous attorneys had failed to request from the Respondent, important evidence needed, and had also "failed to produce, talk to witnesses that are expected to testify and review evidence to support the case."

(4) Prior counsels' failure to complete discovery in time frame set by the court, so that pretrial disclosure can be completed.

Plaintiff also requested the court's assistance in obtaining legal representation.

On the 15th of May, 1996, Petitioner filed a supplemental motion for continuance urging the District Court to take the following facts into consideration in making a decision regarding continuance:

(1) The fact that his grandmother had a heart attack on April 29, 1996 requiring surgery.

(2) The grandmother had another heart attack on May 1, 1996 requiring open heart surgery, and receiving four bypasses.

(3) The fact that Petitioner's grandmother is 80 years old, and Petitioner is her primary caretaker.

(4) Pursuant to the Court's Order, Petitioner informed the court that he was acting pro se and had been unable to search for new counsel or prepare for trial.

The District Court denied Petitioner's motion for continuance, finding that he had failed to offer sufficient grounds to delay the trial. Petitioner subsequently proceeded to trial *pro se.*

REASONS FOR GRANTING THE WRIT

I.

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT GUARANTEES THE RIGHT TO COUNSEL IN A CIVIL PROCEEDING.

The Fifth Amendment to the Constitution provides that no person will be deprived of life, liberty or property without the due process of law. In *Magallane-Damian v. I.N.S.*, 783 F.2d 931 (9th Cir. 1986), the Ninth Circuit Court of Appeals recognized that in civil proceedings, a petitioner's right to counsel is grounded in the Fifth Amendment guarantee of due process. In *Strickland v. Washington*, 466 U.S. 668 (1984) this Court reinforced its view in *McCann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) that the right to counsel is the right to the "effective assistance" of counsel.

A. Due Process requires effective assistance of counsel to guarantee Petitioners right to a fundamentally fair and impartial judicial process.

This Court in *Powell v. Alabama*, 287 U.S. 45 (1932), recognized that the right to counsel under the Sixth Amendment to the U.S. Constitution was designed to protect the fundamental right to a fair trial through the Due Process Clauses.

> The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants "the ample opportunity to meet the case of the prosecution" to which they are entitled.

Strickland v. Washington, 466 U.S. 668 (1984) (quoting *Adams*

v. United States ex rel. McCann, 317 U.S. 269, 275, 276 (1942), "an unaided layman may have little skill in arguing the law or in coping with an intricate procedural system." *Powell*, 287 U.S. at 49. Counsel can deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance." *Strickland v. Washington*, 466 U.S. 668 (1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

B. Where Petitioner asserts a statutory right, due process requires a greater procedural safeguard in order to accomplish the underlying congressional policies.

The opinions of this Court as stated above, become more relevant where as here Petitioner is asserting a statutory right guaranteed under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.

Section 703(a) of the Civil Rights Act prohibits discrimination in employment "with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin . . . " In *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711 (1983), This Court recognized that "the prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy.", and that "[A]ll Courts have recognized that the question facing triers of fact in discrimination are both sensitive and difficult." However, it cautioned that trial courts should not treat discrimination differently from other ultimate questions of fact.

This Court's opinion in *Aikens*, suggests that at the very least in discrimination cases such as this one, where Petitioner is alleging discrimination with respect to pay, promotion *etc.*, the District Court should have exercised its discretion to grant or deny Petitioner's motion for continuance with much caution.

Petitioner informed the District Court that his previous attorneys have not sought evidence needed to establish his case, nor had they interviewed important witnesses. It is quite possible that the District Court, had it taken steps to verify Petitioner's contentions, and concerns, would have found them to have merit.

In *Lowe v. City of East Chicago, Ind.*, 897 F.2d 272, 275 (7th Cir. 1990), the Seventh Circuit found that the trial court abused its discretion in denying the plaintiff's motion for a continuance where prior counsel had done little in preparing the case for trial. In *Lowe*, the trial court granted prior counsel's motion to withdraw where plaintiff had requested the withdrawal, *but refused to grant plaintiff a continuance. Id.*

The facts of *Lowe* are very similar to Petitioner's case here in that Petitioner had repeatedly asked his prior counsel to request certain important evidence from the Respondent and to interview certain witnesses he had provided. When counsel failed to engage in the necessary discovery within the time period set by the Court's Rule 16 Scheduling Order, Petitioner had no choice but to ask them to withdraw. Petitioner then informed the Court of his situation and asked the Court for help in obtaining legal representation so that he could properly prepare his case for trial. It could be argued that Petitioner would have been guilty of negligence had he allowed his case to move forward knowing that critical documents had not been obtained.

1. The Benchmark for judging any claim of ineffective assistance of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a fair and just result.

In *Lockhart v. Fretwell*, 506 U.S. 364 (1993), this Court reaffirmed its opinion in *Nix v. Whiteside*, 475 U.S. 157, 175

(1986), by holding that the major consideration in any claim of ineffective assistance of counsel should be whether the result of the proceeding was fundamentally unfair or unreliable. Therefore, under the test of *Strickland*, to sustain any claim of ineffective assistance of counsel, the Petitioner in this case must be able to establish two things: (1) deficient performance; and (2) prejudice.

Under the facts of this case, Petitioner is able to establish the above requirements. There can be no doubts that where counsel fails to complete discovery, request important evidence necessary to establish the prima facie case, and fails to interview witnesses, his performance is defective most especially in a case of employment discrimination. It is well recognized that proving discrimination in employment is very difficult in most cases given the fact that often times there is no direct evidence of discrimination, the case depends heavily upon circumstantial evidence, usually gathered through witnesses and discovery. Therefore, the need for legal assistance in employment discrimination cases becomes critical.

Circumstances presented Petitioner with a legitimate need for replacement counsel, which was denied by the District Court, without any compelling reasons.

Secondly, there is no doubt that Petitioner was prejudiced by the District Court's refusal to grant a continuance. At an in chambers conference prior to the start of the trial, Petitioner was informed by the District Court that to prove discrimination, he would have to establish certain facts and comparisons with other employees. (T1-14). Petitioner needed certain evidence from the Respondent which Respondent had not provided, and which his prior counsel had failed to request. Therefore, the district court granted a directed verdict on several of Petitioner's claims. While the outcome of this case is not necessarily

determinative, however, the trial could not be said to be a fundamentally fair or reliable proceeding. Petitioner repeatedly sought the assistance of the court in his attempts to introduce evidence, and he was forced to take the stand and testify without the benefit os questioning from a representative.

Petitioner sought a continuance in obtaining adequate legal representation, and also in a supplemental motion for continuance, informed the court that his grandmother had suffered a heart attack which required surgery, therefore, he had been unable to obtain legal representation and/or prepare for the trial. A grant of the continuance in a case where none had previously been requested would have cured Petitioner's dilemmas. Therefore, the trial cannot be said to be fundamentally fair, nor reliable.

II.

THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S MOTION FOR A CONTINUANCE WHERE PETITIONER EXPRESSED HIS DESIRE FOR LEGAL REPRESENTATION AND BEGGED FOR THE COURT'S ASSISTANCE IN OBTAINING LEGAL REPRESENTATION AND THE DISTRICT JUDGE WAS AWARE OF PETITIONER'S NEED FOR CERTAIN EVIDENCE IN ORDER TO ESTABLISH HIS PRIMA FACIE CASE.

The denial of a continuance is within the discretion of the trial court. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). The decision should not be reversed unless it is arbitrary or unreasonable. *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985). Whether a denial of a continuance is so arbitrary as to violate due process depends upon the totality of the circumstances and the facts of the case. *United States v. 2.61*

Acres of Land, More or Less, 791 F.2d 666 (9th Cir. 1985) (citing *Ungar*, 376 U.S. at 589).

In *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1089 (7th Cir. 1982), the Seventh Circuit implied that given the totality of the circumstances, where a party objects to the direction to proceed *pro se* and files a motion for a continuance before the beginning of trial, it is possible to find that the District Court abused its discretion. In this case, Petitioner filed a motion for a continuance after the District Court granted prior counsel's motion to withdraw, and had directed the Petitioner to either produce substitute counsel or be ready to proceed *pro se*. On May 15, 1996, almost three weeks before trial, Petitioner filed a supplemental motion for continuance informing the court that he had been unable to obtain counsel because of his grandmother's health situation and was unprepared for the case.

Clearly, Petitioner's actions suggest that he did not want to proceed *pro se* and is objecting to the court's order.

A. The Appellate Court erred by finding that the District Court did not abuse its discretion in denying Petitioner's motion for a continuance and that Petitioner had failed to show that he was not negligent in requesting that prior counsel withdraw for failure to adequately prepare the case for trial.

The Appellate Court concluded that Petitioner had failed to show that he was not negligent by asking his prior counsel to withdraw 60 days before trial. Petitioner did not have a choice but to ask prior counsel to withdraw. Petitioner had repeatedly asked prior counsel to request certain critical documents from Respondent in order to establish his prima facie case. Prior counsel also failed to talk to witnesses and to complete pre-trial discovery in a timely manner.

Based on similar facts, the Seventh Circuit found that the trial court *had* abused its discretion when it failed to grant a motion for continuance where plaintiff's counsel "had done little in the way of preparing for the case." The same circumstances are present in this case. Petitioner's prior counsel failed to engage in basic discovery so as to properly prepare Petitioner's case. *Lowe v. City of East Chicago, Ind.*, 897 F.2d 272, 275 (7th Cir. 1990).

B. "A myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."

This Court echoed the above opinion in *Ungar v. Sarafite*, 376 U.S. 575 (1964). Even though it was issued in a criminal case where the Sixth Amendment right to the assistance of counsel was implicated, the same view should equally apply in this case, where Petitioner's need and desire for the assistance of counsel was equally as important, and the appropriate request made.

In *Chandler v. Fretag*, 348 U.S. 3, 9, 10 (1954), this Court reaffirmed its decision in *Powell v. Alabama*, 287 U.S. 45, 69 (1932), when it held that

> "if in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, . . . it reasonably may not be doubted that such a refusal, would be a denial of hearing, and therefore, of due process in the constitutional sense." "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."

Powell, 287 U.S. at 68. In *Castaneda-Delgado v. Imm. and*

National. Serv., 525 F.2d 1295 (7th Cir. 1975), the Court of Appeals for the Seventh Circuit found that the Immigration Judge had abused its discretion in denying a motion for continuance where there was no time pressure or there was no record that it was not practicable to allow additional time under the circumstances. In that case, the court concluded that a reasonable continuance would have enabled the petitioners in that case to obtain counsel. The court concluded that the petitioners were denied procedural due process when the Immigration Judge denied their request for a continuance, thereby depriving them of their right to counsel.

The same situation applies in this case, from the time the complaint was filed on July 15, 1995, to the trial date of June 4, 1996, the total time period was less than a year. There did not appear to be any time pressures on the District Court since discrimination cases on average take over a year from the date of filing to trial date. The District Court had no compelling reason to deny Petitioner's motion, and in fact, gave no compelling reason. The District Court simply failed to inquire into the reasons given by Petitioner for wanting a continuance because Petitioner had requested the withdrawal of prior counsel.

1. The proper standard for a denial of a motion for a continuance is whether the District Court abused its discretion.

The decision of whether to grant a motion for a continuance is within the broad discretion of the trial court. *Ungar*, 376 U.S. at 589 (1964). Some of the factors a trial court should consider in deciding whether to grant a continuance are: (1) appellant's diligence in attempting to prepare his case for the originally scheduled trial date; (2) the likelihood that the grant of a continuance would have resolved the problem which led the appellant to seek a continuance; (3) the inconvenience continuance would have caused the court and the opposing party;

and (4) the extent to which the appellant might have suffered harm as a result of the district court's denial *United States v. Mejia*, 69 F.3d 3309 (9th Cir. 1995) (citing *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985), amended 764 F.2d 675.

The fact of this case satisfies all of the above factors in Petitioner's favor. Petitioner filed two motions for a continuance so that he could prepare his case and seek new counsel. Given the fact that Petitioner is the primary caretaker of his grandmother, and did not have time to seek counsel, Petitioner was still able to try the case *pro se* at trial.

Secondly, had the request for a continuance been granted, Petitioner would have been able to obtain new counsel to help try his case. This is supported by the fact that two weeks after trial, Petitioner was able to obtain new counsel to pursue a motion for a new trial.

Thirdly, there was no indication that the grant of a continuance would have inconvenienced the court or the opposing party.

Finally, it is clear that Petitioner was prejudiced in that he was not able to secure the service of counsel, and he was not able to obtain the evidence needed from the Respondent. The District Court eventually concluded that Petitioner had not been able to establish his prima facie case.

2. Due process is violated where the decision to deny a motion for a continuance is arbitrary and unreasonable given the totality of the circumstances of the case.

This Court has implied that there are instances when a denial of a request for more time violates due process *Ungar v. Sarafite*, 376 U.S. 575 (1964) (citing *Avery v. Alabama*, 308 U.S. 444

(1940). Whether a denial of a motion for a continuance violates due process is to be determined by the totality of the circumstances, particularly considering the reasons presented to the judge at the time the request is denied. *Nilva v. United States*, 352 U.S. 385 (1957). "The right to have the assistance of counsel is to fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76 (1942).

The Court of Appeals for the Seventh Circuit found that an immigration judge's decision to deny a motion for a continuance was arbitrary and capricious and therefore, a denial of due process where there was no indication of any pressure for time "or that it was not practicable to allow additional time under these circumstances." *Castaneda-Delgado v. Imm. and Natural, Serv.*, 525 F.2d 1295, 1299-1302 (7th Cir. 1975).

The Ninth Circuit came to the same conclusion, and found that a district judge had "acted in an arbitrary and unreasonable manner, and thus abused its discretion in failing to grant the continuance," where the appellant had requested for time in order to reinstate it corporate status. *United States v. 2.61 Acres of Land, more or less*, 791 F.2d 666, 672 (9th Cir. 1985).

Considering all the cases above, under the total circumstances of this case, the district court abused its discretion by denying Petitioner's motion for a continuance. Petitioner had no choice but to ask prior counsel to withdraw when it failed to make necessary preparations for trial. After the District Court granted prior counsel's motion to withdraw, and ordered Petitioner to get ready to provide a substitute counsel or proceed *pro se*, Petitioner immediately filed a motion for a continuance, stating the reasons why a continuance was needed, and requesting the help of the court in obtaining legal representation.

About two weeks later, Petitioner filed a supplemental motion for a continuance informing the District Court that due to the health of his grandmother, given the fact that he was her primary caretaker, he had not been able to obtain a new counsel and had not had time to prepare adequately for the upcoming trial. From the time the complaint was filed to the time of the trial, the case had been less than a year old. There was no indication that the court was pressed for time, and a grant of continuance for a short period of time would have cured Petitioner's problems. As a matter of fact, Petitioner was able to obtain new counsel within two weeks after the trial ended.

Therefore, given the circumstances of this case, Petitioner was denied due process of law, where the court was aware that Petitioner desired legal representation and had a valid need for one in order to be able to establish his prima facie. In conclusion, the District Court's decision to deny both motions for continuance was arbitrary and capricious, and therefore, a denial of due process.

CONCLUSION

The District Court denied Petitioner the due process of law and abused its discretion when it denied Petitioner's request for more time in order to obtain legal representation because the district court was aware that Petitioner desired legal representation and was also aware of the reasons why Petitioner needed more time. There was no time pressures on the court, and a grant of a continuance would have cured Petitioner's dilemma. Petitioner, therefore, respectfully requests this Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 29, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6797
Non-Argument Calendar

D.C. Docket No. CV-95-0543-BH-M

GREGORY DENNIS,

Plaintiff-Appellant,

versus

SCOTT PAPER COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

(May 29, 1997)

Before BIRCH and CARNES, Circuit Judges, and CLARK, Senior Circuit Judge.

CLARK, Senior Circuit Judge:

Plaintiff-appellant Gregory Dennis appeals a final judgment for defendant-appellee Scott Paper Company in his employment discrimination action. Dennis alleged that Scott subjected him to race discrimination during his employment and discharge. At

the conclusion of Dennis's case, the district court granted Scott's motion for judgment as a matter of law as to his claims of racial discrimination with respect to pay, promotions, conditions of employment, and harassment, finding that Dennis had failed to establish a *prima facie* case. The jury returned a verdict for Scott and against Dennis on his retaliatory discharge claim.

On appeal, Dennis raises two issues: (1) whether the district court abused its discretion in denying his motion for a continuance; and (2) whether the district court erred in granting Scott's motion for judgment as a matter of law.

I. BACKGROUND

Dennis, an African-American, was employed by Scott at their paper manufacturing plant in the Distribution Center in Mobile, Alabama in 1979. After working as a shipping and receiving coordinator for six years, Dennis was promoted to a shift supervisor and was later transferred to the repack department as an operation supervisor.

When Scott reorganized the Distribution Center in late March 1994, Dennis was a production team leader reporting to Regional Logistics Manager Bill Wente. Because of a company-wide wage freeze, neither Dennis nor any other salaried employees received salary increases to accompany their heavier workloads or merit pay raises in 1994. In August 1994, the Distribution Center was again reorganized. Although many salaried employees were involuntarily separated, Dennis was retained and promoted to the Operating Floor Leader/Maintainer of the Production Team. In his new position, Dennis reported to the newly-appointed Warehouse Manager, Win Etheridge. Despite an increase in their responsibilities as a result of the

employee reductions and reorganization, neither Dennis nor any other salaried employee received a pay raise in August 1994. Dennis told Wente that he should have been given the warehouse manager's job instead of Etheridge.

At the end of 1994, Scott's wage freeze was lifted and, in January 1995, Dennis received a combined promotional and merit pay raise of $3,000, increasing his salary to $45,700. Dennis was dissatisfied with his raise, and visited Phil Monroe, Vice President of the Mobile Mill. Monroe referred Dennis to John Sharp, Director of Human Resources, but then met with Dennis after Dennis had seen Sharp. Following three disputes during the next few months between Dennis and Etheridge, Dennis spoke with Wente. A dispute then arose as to whether Dennis had resigned and, following an investigation, Sharp concluded that Dennis had resigned during his conversation with Wente.

Dennis's complaint was filed by attorneys Richard A. Meelheim and Christa Hayes Meelheim of the law firm of Meelheim & Alexander in July 1995. In September 1995, the court scheduled the trial for May 1996. The Meelheims represented Dennis through discovery and an April 1996, settlement conference. On April 12, 1996, the court continued the trial date until June 4, 1996.

On April 24, 1996, the Meelheims moved to withdraw because Dennis had "informed them that he no longer wishes for them to represent him in this matter, and that he intends to seek other representation." On April 29, 1996, the district court granted the motion "provided counsel serves a copy of this order on the plaintiff" by May 9, 1996, and submitted proof of service to the court. The court ordered Dennis to advise the court by

May 16, 1996, of the identity of his newly-retained counsel or his intent to proceed *pro se*, and advised him that "(t)he fact that plaintiff desires and/or does retain substitute counsel will not constitute grounds to continue the jury selection and trial of this action as set during the June civil trial term of court."

Dennis, proceeding *pro se*, then moved for a continuance in the trial date, discovery, and pretrial disclosure. He stated that a continuance was needed to obtain a lawyer and allow the new lawyer to prepare for trial, and request and obtain "important documents" to be used as evidence, talk to witnesses, and review the evidence. He also requested court assistance in obtaining proper representation. On May 14, 1996, Dennis advised the court that he would be proceeding *pro se* unless the motion for continuance of the trial and discovery was granted. He supplemented his motion for continuance explaining that he was the primary caretaker for his grandmother, who had a heart attack on April 29, 1996, and had been unable to search for new counsel or prepare for trial. He also moved to amend the Pretrial Order because he disagreed with some statements in the Agreed Facts.

The district court denied Dennis's motion for continuance, finding that Dennis had failed to offer sufficient grounds to delay the trial. With Dennis proceeding *pro se*, the case went to trial on June 12, 1996. As noted above, the district court granted Scott's motion for judgment as a matter of law at the conclusion of Dennis's case with respect to his claims of racial discrimination with respect to pay, promotions, conditions of employment, and harassment, and the jury returned a verdict for Scott and against Dennis on his claim of retaliatory discharge.

On June 24, 1996, attorney Ronnie L. Williams entered an appearance as counsel for Dennis, and moved for judgment

notwithstanding the verdict, or alternatively, for a new trial. The district court denied the motion because Dennis failed to make the required motion for a directed verdict at the close of all the evidence and the jury's verdict was not against the great weight of the evidence presented.

II. DISCUSSION

A. *Continuance*

A lawyer's withdrawal does not afford a party an absolute right to a continuance.[1] The district court's ruling on a motion for continuance based on withdrawal of counsel will be disturbed only in extreme cases in which it is clear that the moving party is free of negligence.[2]

In this case Dennis dismissed his attorneys around April 20, 1996, with knowledge that his trial date was within 40 days. In the order granting the withdrawal, the district court advised Dennis that the retention of substitute counsel would not constitute grounds for a continuance. Dennis's motion for continuance did not specify the length of the requested continuance, and did not indicate that he would have been able to obtain counsel if a continuance had been granted. In fact, he elected to proceed *pro se*, and never renewed the motion for a continuance. Because Dennis failed to show that he was free of negligence in asking his attorneys to withdraw within 60 days of trial, or in seeking substitute counsel, it does not appear that the district court abused its discretion in denying the motion.

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1. *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1478 (11th Cir. 1991) (citation omitted)

2. *Id.*

Appendix A

B. *Judgment as a matter of law*

This court reviews *de novo* a district court's grant of judgment as a matter of law.[3] In considering such a motion, a court must view all the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party, and it may not weigh the evidence or assess the witnesses' credibility.[4] It should grant the motion only if "reasonable people in the exercise of impartial judgment could not arrive at a contrary verdict."[5]

To prove discriminatory treatment violating Title VII, a plaintiff must first establish a *prima facie* case of discrimination.[6] Absent direct evidence of discrimination, a plaintiff may establish a *prima facie* case by showing that (1) he is member of a protected class, (2) he was qualified for and applied for a position, (3) despite his qualifications, he was rejected, and (4) that other equally or less qualified employees who were not members of the protected class were promoted.[7] If a *prima facie* case is established, the inference is raised that discriminatory intent motivated the adverse employment action, and the burden

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3. *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 439 (11th Cir. 1996).

4. *Id.*

5. *Id.*

6. *Coutu v. Martin County Board of County Commissioners*, 47 F.3d 1068, 1073 (11th Cir. 1995).

7. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1539 n. 11 (11th Cir. 1997).

shifts to the employer to produce legitimate, non-discriminatory reasons for the challenged employment action.[8] If the employer satisfies this burden, the burden again shifts to the plaintiff to show that the reasons given by the employer were not the real reasons for the adverse employment action.[9]

Dennis alleged that Scott discriminated against him in (1) promotions, (2) pay raises, and (3) conditions of employment and harassment. He claimed that Gene Wheat, a white employee, received an increase in his "Hay" points while Dennis did not and Winn Etheridge, a white employees, was promoted over him.

The evidence established that, when a former co-employee was transferred to another department, some of his former job duties were split between Wheat and another white employee. Because of their additional duties, their jobs were redescribed and their "Hay" point values were reevaluated. In the reevaluation, Wheat's point value was upgraded from 308 to 342 points and his salary was increased. Dennis's point value was 332, and his salary was $42,700, and, despite Wheat's reevaluation, Dennis made "a thousand or two more" dollars than Wheat.

Dennis presented no evidence as to what job duties were assigned to Wheat, and did not claim that he should have been assigned the duties. Therefore, the district court did not err in finding that he had failed to establish a *prima facie* case as to whether he was qualified for the "job" duties. Further, Scott established that Wheat's Hay point values were reevaluated

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8. *Id.* at 1528.

9. *Id.*

based on the newly-assigned duties, and Dennis presented no evidence to show that this reevaluation was pretextual.

As to Etheridge's promotion over Dennis as Warehouse Manager, the evidence established that Etheridge had worked for Scott for over 30 years, had worked his way up the hourly employees' line-of-progression, and had been in supervision positions for 26 years as Assistant Supervisor, Repack Supervisor, Shift Supervisor, Shift Manager, and Logistics Resource. At the time of the promotion, he had a Hay point value in the "600 range." At the time of the promotion, Dennis had worked for Scott for 15 years, and had been in supervision for 13 years.

Dennis failed to show that Etheridge was less qualified or only equally qualified for the position. Scott produced legitimate, non-discriminatory reasons for promoting Etheridge instead of Dennis, and Dennis failed to show that those reasons were pretextual. Therefore, it does not appear that the district court erred in finding that Dennis had failed to state a *prima facie* case as to promotion.

Dennis claimed that he had never reached the "mid-point" of his salary range even though his performance ratings were favorable, had not received a merit or promotion increase in 1994, and had not received an adequate pay increase in 1995.

To establish a *prima facie* case of racial discrimination with respect to pay, a plaintiff must show that he was paid less than a member of a different race for work requiring substantially the same responsibility.[10]

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10. *Morgan v. City of Jasper*, 959 F.2d 1542, 1545-1546 (11th Cir. 1992).

Dennis presented no evidence that he was paid less than a member of a different race for work requiring substantially the same responsibility. The evidence presented showed that Dennis's salary was considered by Scott to be "pretty much mid-point" as his "comp ratio" was 95% or above, and that Scott's goal of moving employees to the mid-point of their salary range was tempered by the availability of monies to be paid in salaries in a given year. There were no merit raises given to any salaried employees in 1994, and no promotional raises given to any salaried employees in the last half of 1994. Only three promotional raises were given in the first half of 1994, and all went to African-Americans. Further, Scott received a 7% raise in 1995, after the wage freeze was lifted, and was one of only three salaried employees at the Distribution Center, and one of only 17 out of 172 salaried employees in the Mobile Mill to receive a raise. Although a white employee received $400 more in his promotional raise than Dennis did, that employee's salary was less than Dennis's, even though the two had comparable jobs with identical Hay point values and the white employee had longer service with Scott. Wente explained that the white employee's larger increase was made to move their salaries closer together since they were "working the same job."

This court has held that "Title VII is designed to protect employees against discrimination based on race, sex, or national origin; it is not designed to protect against any and all unfair treatment in the work place."[11]

Dennis failed to show that he was subjected to any discrimination or harassment based on race. The evidence showed that, as a result of the reductions of staff, all of the

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11. *Coutu*, 47 F.3d at 1075.

salaried employees at Scott shouldered increased responsibilities without substantial pay increases. Although Dennis may have assumed more responsibilities than Dale Morrison, his white counterpart, Morrison supervised more staff, and was responsible for more equipment. However, Dennis was paid more. Further, Scott showed that it had paid his tuition and fees for both two and four year college degrees, allowed him to take time off during working hours to attend classes, had sent him for interviews both with their executive office and field offices.

III. CONCLUSION

For the reasons stated above, the district court's judgment is AFFIRMED.

APPENDIX B — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION DATED JUNE 12, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
95-0543-BH-M

GREGORY DENNIS,

Plaintiff,

v.

SCOTT PAPER COMPANY, INC.,

Defendant.

JUDGMENT

Pursuant to the verdict of the jury and the order entered by the court this day, it is **ORDERED, ADJUDGED** and **DECREED** that **JUDGMENT** be and is hereby entered in favor of the defendant, Scott Paper Company, Inc., and against the plaintiff, Gregory Dennis, the plaintiff to have and recover nothing of the defendant. Costs are taxed against the plaintiff.

DONE this 12th day of June, 1996.

s/ illegible
SENIOR DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
95-0543-BH-M

GREGORY DENNIS,

Plaintiff,

v.

SCOTT PAPER COMPANY, INC.,

Defendant.

ORDER

This action came on for jury selection on June 4, 1996, and for trial before such jury on June 5, 6, 10, 11 and 12. At the close of plaintiff's case, the defendant moved the court for a judgment as a matter of law on each of plaintiff's claims of racial discrimination, namely the claims for discrimination with respect to pay; discrimination with respect to promotions and conditions of employment; harassment; and retaliatory discharge. As stated on the record in open court, the court concludes that plaintiff has failed to establish by the evidence proffered a *prima facie* case that he was treated any differently than any other employee, black or white, with regard to either his pay or any of the terms and conditions of his employment. Plaintiff has likewise failed to establish that he was, on the basis of his race, denied a promotion to a position for which he was qualified. Inasmuch as plaintiff's harassment claim is also

predicated on the amount of work he was required to perform at what he asserted to be inadequate compensation, plaintiff has failed to establish by the evidence proffered a *prima facie* case of harassment. In contrast, the court concludes that plaintiff has submitted sufficient evidence to establish a jury question regarding his claim that he did not quit his employment with the defendant but was instead terminated because he threatened to file suit against the defendant contending that he had been discriminated against on the basis of his race. It is therefore **ORDERED** that defendant's motion for a judgment as a matter of law on plaintiff's claims for discrimination with respect to pay; discrimination with respect to promotions and conditions of employment and harassment be and is hereby **GRANTED** while defendant's motion is **DENIED** with respect to plaintiff's claim of retaliatory discharge.

On July 12, 1996, the jury having heard oral arguments and the court's charge, returned its verdict in favor of the defendant, Scott Paper Company, Inc., and against the plaintiff, Gregory Dennis. Accordingly, it is now **ORDERED** that **JUDGMENT** be entered in favor of the defendant, Scott Paper Company, Inc., and against the plaintiff, Gregory Dennis, the plaintiff to have and recover nothing of the defendant. Costs are taxed against the plaintiff.

DONE this 12th day of June, 1996.

s/ illegible
SENIOR DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION FILED MAY 20, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
95-0543-BH-M

GREGORY DENNIS,

Plaintiff,

v.

SCOTT PAPER COMPANY, INC.,

Defendant.

ORDER

This action is before the court on plaintiff's motion for a continuance (Tab 23), as supplemented on May 14, 1996 (Tab 29). Upon consideration of the motion as supplemented, defendant's response in opposition thereto and pertinent portions of the record, the court concludes and it is therefore **ORDERED** that the motion is due to be and is hereby **DENIED**. Plaintiff has failed to offer sufficient grounds to delay the trial of the action which was set on April 11, 1996, to commence with jury selection on June 4, 1996.[1] Plaintiff was cautioned on April 29,

1. Trial was initially set to be conducted during the May 1996 trial term. *See*, Rule 16(b) Scheduling Order dated September 11, 1995 (Tab 7).

1996, that his desire to retain substitute counsel following the pretrial conference at which the trial date was expressly set **"WILL NOT CONSTITUTE GROUNDS TO CONTINUE THE JURY SELECTION AND TRIAL."** *See*, Order of April 29, 1996 (Tab 22).

The court has also reviewed plaintiff's motion to amend the pretrial order (Tab 29) which was filed on May 17, 1996. In the event defendant objects to this motion, it is **ORDERED** that such objection be made in writing and **FILED** with the court **on or before May 30, 1996.**

DONE this 20th day of May, 1996.

s/ illegible
SENIOR DISTRICT JUDGE

APPENDIX D — DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 28, 1997

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-6797

GREGORY DENNIS,

Plaintiff-Appellant,

versus

SCOTT PAPER COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Alabama

BEFORE: BIRCH and CARNES, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, Gregory Dennis, is DENIED.

ENTERED FOR THE COURT:

s/ illegible
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-899

In The

Supreme Court of the United States

October Term, 1997

GREGORY DENNIS,

Petitioner,

vs.

SCOTT PAPER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a civil litigant's right to procedural due process under the Fifth Amendment is violated when his motion for continuance of trial to obtain substitute counsel is denied after, having been on notice of the scheduled trial date for over eight months, he dismissed his originally-chosen counsel forty-five days prior to trial.

STATEMENT PURSUANT TO RULE 29.6

The parties to the proceedings below were the Petitioner Gregory Dennis and Respondent Scott Paper Company. Kimberly-Clark Tissue Company is the successor by merger to Respondent. The parent company of Respondent is Kimberly-Clark Corporation. Respondent has no nonwholly owned subsidiaries.

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Supreme Court Rule 10 5

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

This suit arose out of Petitioner Greg Dennis's ("Dennis") termination of employment with Respondent Scott Paper Company ("Scott Paper") in April 1995. Because of the nature of the issue raised by Dennis in his Petition, the dates of pertinent events will be specified in this Statement of the Case.

Following his termination, Dennis, an African-American, filed a charge of racial discrimination with the Equal Employment Opportunity Commission ("EEOC") in May 1995. While that charge was pending, Dennis filed a civil action in the United States District Court for the Southern District of Alabama (Southern Division) on July 10, 1995 alleging that Scott Paper had deprived him of his rights under the Civil Rights Act of 1866, 42 U.S.C. § 1981, *et seq*. Dennis was represented by attorneys Richard H. Meelheim and Christa Hayes Meelheim of Birmingham, Alabama, whom he had selected to represent him in his suit.

Subsequently, Dennis obtained a right-to-sue letter from the EEOC and, in December 1995, amended his Complaint to assert a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*.

On September 11, 1995, the district court entered its Rule 16(b) Scheduling Order setting, among other things, discovery

cutoff for February 16, 1996 and trial to begin "sometime during the civil term beginning Tuesday, May 7, 1996." (R1-7). (Subsequently, on April 12, 1996, the case was rescheduled for jury selection on June 4, 1996, with trial to commence during the June trial term.)

Dennis was represented by his original counsel through discovery, which concluded on February 16, 1996, and a settlement conference with the Magistrate Judge on April 16, 1996, which was unsuccessful.

On April 19, 1996, forty-five days[1] prior to the scheduled striking of the jury, Dennis's counsel moved to withdraw as attorneys of record for him on the grounds that "[Dennis] has informed them that he no longer wishes for them to represent him in this matter, and that he intends to seek other representation." (R1-20). On April 29, 1996, counsel's motion to withdraw was granted "***provided*** counsel serves a notice of this order on plaintiff **on or before May 9, 1996** and submits proof of such service to the Court." (R1-22) (emphasis in original). The district court ordered Dennis to advise the court in writing on or before May 16, 1996 "of the identity of his newly retained counsel or his intent to proceed *pro se* (i.e., without representation by counsel)." *Id.* The court's order also stated:

> **THE FACT THAT PLAINTIFF DESIRES AND/ OR DOES RETAIN SUBSTITUTE COUNSEL WILL NOT CONSTITUTE GROUNDS TO CONTINUE THE JURY SELECTION AND**

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1. In its opinion, the Eleventh Circuit observed that Dennis dismissed his attorneys around April 20, 1996, with knowledge that his trial date was within *forty* days. (App. 5a). More accurately, Dennis dismissed his counsel on or before April 19, which was at least *forty-five* days before the jury was scheduled to be selected on June 4, 1996.

TRIAL OF THIS ACTION AS SET DURING THE JUNE CIVIL TRIAL TERM OF COURT.

Id. (emphasis in original).

The following day, April 30, 1996, Dennis, *pro se*, filed a motion for continuance to obtain new counsel, to reopen and extend discovery, and to "complete" the pretrial disclosure document. (R1-23). On May 14, 1996, Dennis, who is a college graduate, advised the district court that he intended to proceed *pro se*. He also filed a supplemental motion for continuance and a motion to amend the pretrial order on that day.

Approximately two weeks before trial, on May 20, 1996, the district court denied Dennis's motion for continuance and his motion to amend the pretrial order. Dennis did not renew his motion for continuance thereafter.

On June 4, 1996, a jury was selected. Trial began the following day, June 5, and continued on June 6, 10, 11, and 12. Dennis used four days to present his case-in-chief, calling thirteen witnesses (in addition to himself) and introducing over forty exhibits. At the close of Dennis's evidence, Scott Paper's motion for a judgment as a matter of law under Fed. R. Civ. P. 50(a)(1) was granted by the district court with respect to Dennis's claims of racial discrimination with respect to "pay, promotions, and conditions of employment, and harassment," but denied with respect to Dennis's claim of "retaliatory discharge."

Following the presentation of Scott Paper's evidence and Dennis's rebuttal evidence, the jury returned a verdict in favor of Scott Paper as to Dennis's claim of retaliatory discharge and the district court entered judgment for Scott Paper.

Attorney Ronnie L. Williams noticed his appearance for Dennis on June 24, 1996 and filed a motion for a new trial and for judgment notwithstanding the verdict on behalf of Dennis. The motion was denied.

Dennis then appealed to the United States Court of Appeals for the Eleventh Circuit. Dennis raised two issues: (1) whether the district court abused its discretion in denying his motion for a continuance, and (2) whether the district court erred in granting Scott Paper's motion for judgment as a matter of law. The Eleventh Circuit affirmed the judgment of the district court. In addressing Dennis' claim that the district court abused its discretion in denying his motion for a continuance, Senior Circuit Court Judge Clark, who authored the panel's opinion, wrote:

> A lawyer's withdrawal does not afford a party an absolute right to a continuance.[1] The district court's ruling on a motion for continuance based on withdrawal of counsel will be disturbed only in extreme cases in which it is clear that the moving party is free of negligence.[2]
>
> In this case Dennis dismissed his attorneys around April 20, 1996, with knowledge that his trial date was within 40 days. In the order granting the withdrawal, the district court advised Dennis that the retention of substitute counsel would not constitute grounds for a continuance. Dennis's motion for continuance did not specify the length of the requested continuance, and did not indicate that he

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1. *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1478 (11th Cir. 1991)(citation omitted).

2. *Id.*

> would have been able to obtain counsel if a continuance had been granted. In fact, he elected to proceed *pro se*, and never renewed the motion for a continuance. Because Dennis failed to show that he was free of negligence in asking his attorneys to withdraw within 60 days of trial, or in seeking substitute counsel, it does not appear that the district court abused its discretion in denying the motion.

(App. 5a).

REASONS FOR DENYING THE WRIT

Review on a writ of certiorari "is not a matter of right, but of judicial discretion" to be granted "only for compelling reasons." Supreme Court Rule 10. Petitioner has failed to present any *compelling* reasons for the grant of certiorari. His petition does not fall within any of the reasons enumerated in Rule 10. It does not present a conflict among the lower courts or with a relevant decision of this Court, nor does it present an important question of federal law that has not been, but should be, settled by this Court, not does it contain any suggestion of departure "from the accepted and usual course of judicial proceedings." Rather, Petitioner's claim is nothing more than a garden variety complaint about the discretionary call of a district judge as to whether to grant a trial continuance, which complaint does not rise to the level of a constitutional issue under these circumstances.

It is undisputed that Petitioner Dennis began his action with counsel of his own choosing. Dennis was on notice of the scheduled trial date a full eight months prior thereto. After Dennis had proceeded with his counsel for approximately nine and one-half months, at a point when discovery had been closed for over two months, a pretrial order entered, and a settlement

conference with the Magistrate-Judge unsuccessfully completed, Dennis dismissed his counsel, knowing that jury selection was forty-five days away. Dennis was cautioned at the time by the district court that the trial would not be continued should he be unsuccessful in obtaining new counsel. Nevertheless, Dennis pursued the case without his originally-chosen counsel. He informed the Court approximately three weeks before trial that he intended to proceed *pro se*. After the court denied Petitioner's motion for continuance two weeks prior to trial, Dennis never renewed his motion or otherwise showed any reluctance to proceed *pro se*.

Dennis, a college graduate, filed four pleadings, including a well-stated, six page motion to amend the pretrial order. At trial, Dennis ably represented himself, calling and examining thirteen witnesses (in addition to himself), cross-examining Respondent's five witnesses, introducing into evidence over forty exhibits, presenting his opening statement, and making his closing argument to the jury. If there was any prejudice to Dennis because of his lack of counsel at trial, Dennis must assume responsibility for same, since it was he who requested his originally-chosen counsel to withdraw six weeks before trial. The district judge acted well within his range of discretion in denying the continuance. The Court of Appeals for the Eleventh Circuit also correctly concluded that this was not one of the "extreme cases" where it is clear that "the moving party is free of negligence" and a continuance should have been granted. Certainly, Dennis's Fifth Amendment due process rights were not implicated here.

In his Petition, Dennis cites case authority construing criminal cases under the Sixth Amendment to argue, first, that he has a constitutional right to "effective assistance" of counsel in his civil proceeding and, second, that the district court violated his due process rights by denying his motion for a continuance

in order to obtain replacement counsel for his allegedly "ineffective counsel."

The Sixth Amendment cases are inapposite to this civil suit. This Court has drawn distinctions between a defendant's rights where his personal liberty is at stake versus a litigant's rights in a civil case where personal liberty is not at issue. For example, where a litigant may lose his physical liberty if he loses the litigation, the Court has recognized a right to appointed counsel. *In re Gault*, 387 U.S. 1 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Where there is no threatened loss of physical liberty, however, the Court has refused to find a constitutional right to appointed counsel. *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981). Further, in criminal cases, the Court has held that the right to counsel under the Sixth Amendment includes the right to the "effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984), quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). However, no comparable, constitutional right to effective assistance of counsel has ever been imposed in a civil case. *See Garza v. Carlson*, 877 F.2d 14, 17 (8th Cir. 1989); *Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510, 1522 (11th Cir. 1983).

Moreover, the case at bar is not an appropriate one for the Court to address the weighty issues of a litigant's claimed "right" to "effective assistance" of counsel in a civil suit, or whether a civil litigant's due process rights are violated by the denial of his motion for continuance in order to obtain substitute counsel. In the first place, the issue of the effectiveness of Petitioner's counsel was not presented to the Court of Appeals for its consideration. Ordinarily, this Court does not address issues which were not first presented to the lower court. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Secondly, Petitioner's allegations regarding the inadequacy of his former counsel present matters *dehors* the record in this case. There is no evidence in the record as to any witness whom Dennis's former counsel failed to interview, nor any allegedly "critical document" which Dennis requested, but counsel failed to obtain. More importantly, there is no evidence in the record of any witness who could not testify at trial, nor any document which Dennis required for trial, but was unable to get. The Court cannot evaluate Dennis's claim of ineffective counsel on the record in this case.

Finally, Dennis requested his counsel to withdraw forty-five days prior to trial, which was not a constitutionally inadequate time for him to hire replacement counsel and prepare his case. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (five days notice of criminal contempt proceeding was constitutionally adequate time to hire counsel and prepare a defense under the circumstances).

But even applying the standards of review established by the Court in the area of criminal law, it is apparent that the district court's denial of a continuance in this instance was not an abuse of its discretion and, certainly, not a violation of Dennis' due process rights.

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. . . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. . . . There are no mechanical tests for deciding when a denial of a continuance is

> so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Ungar, supra, at 589 (citations omitted).

Dennis' motion for continuance was not limited to a request for a continuance of the trial setting. His motion also requested the reopening of discovery and an opportunity to amend the pretrial disclosures. The motion did not specify the length of the requested continuance, but it implicitly requested a lengthy continuance to accomplish the foregoing. No representation was made that prospective counsel had been contacted or that substitute counsel had agreed to appear if a continuance were granted.

Dennis supplemented his motion for continuance two weeks later to allege that his grandmother, for whom he claimed to be the "primary caretaker," had suffered a heart attack on April 29, 1996. This ground was not in Dennis' initial motion for continuance, filed on April 30, *the day after* the alleged heart attack. No verification of Dennis' grandmother's heart attack was ever provided the district court, nor was there ever any explanation as to why Dennis' mother, who lives in the same city as Dennis and his grandmother, was unable to care for Dennis' grandmother. Evidence was adduced at trial, however, that Dennis had used his grandmother's alleged illnesses before to excuse his absences from work following disputes with his superiors. (R3-310).

Thus, it likely appeared to the district court that Dennis was seeking to use his dismissal of counsel as an opportunity to extend discovery and reopen all that had been done in the case to that point. At the least, the district court could genuinely

question Dennis' good faith because of the timing of his dismissal of counsel, over two months after the close of discovery, and his immediate filing of a motion for continuance. Also, the court could genuinely question Dennis' allegations of his grandmother's condition in light of the fact that it was not included in his original motion filed the day after her alleged heart attack. The circumstances of this case do not support Dennis' claim that the district court abused Dennis' procedural due process rights in denying his motion for continuance.[2]

In summary, Dennis began his suit with counsel of his own choice. After approximately nine and one-half months of litigation, when the case was ready for trial and settlement had been unfruitful, Dennis dismissed his counsel, knowing that trial was forty-five days away. After being warned by the district court that the trial would not be continued should he be unsuccessful in obtaining new counsel, Dennis nevertheless pursued the case without his original counsel, trying to reopen discovery and restructure the case to suit his wishes. After Dennis's motion for continuance was denied two weeks prior to trial, Dennis never renewed his motion for a continuance. Instead, he proceeded to ably represent himself at trial. Under

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2. There are numerous cases in which the Courts of Appeal have affirmed the denial of motions for continuance in criminal cases, where the Sixth Amendment's guarantees to counsel apply, under circumstances even more favorable to the movant than here. *See, e.g., Urquhart v. Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984) (defendant represented by appointed counsel requested continuance on day of trial in order to retain private counsel); *United States v. Sexton*, 473 F.2d 512, 513 (5th Cir. 1973) (defendant who had had ample time to employ counsel sought continuance to discharge court-appointed counsel and retain private counsel); *United States v. Pigford*, 461 F.2d 648, 649 (4th Cir. 1972) (defendant sought continuance at trial to change private counsel); *United States v. Grow*, 394 F.2d 182, 209 (4th Cir.) (defendant who discharged counsel on eve of trial sought continuance in order to secure replacement), *cert. denied*, 393 U.S. 840 (1968).

the circumstances, Dennis has not been denied or deprived of procedural due process under the Fifth Amendment to the United States Constitution.

CONCLUSION

The decision of the Eleventh Circuit in this case is well-reasoned and imminently correct. Clearly, Petitioner's right to procedural due process was not abridged by the district court's denial of his motion for continuance following his dismissal of his attorneys with knowledge that his trial date was within forty-five days.

Accordingly, Petitioner has failed to advance any reason, and clearly no *compelling* reason, for grant of certiorari. For the foregoing reasons, it is respectfully submitted that his Petition should be denied.

Respectfully submitted,

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